

**ORDERED** that Defendants Velez Capital Management LLC ("VCM"), Oliver Velez, Paul Lange, Saul Ortiz-Stevens, and Stephen Cina are:

1. Temporarily enjoined and will immediately cease and desist from using materials obtained from PCH, including but not limited to materials taken from "The Pristine Method<sup>®</sup>" manual, and from using the "Trade for Life" manual, including any excerpts or materials therefrom at the San Diego Traders Expo during the period June 20, 21, 22, and 23, 2007;
2. Temporarily enjoined and will immediately Cease and Desist from copying and plagiarizing Plaintiffs' copyrighted and trademarked material, and registered service marks, including but not limited to The Pristine Method<sup>®</sup>;
3. Temporarily enjoined and will immediately Cease and Desist from copying and plagiarizing materials copyrighted and trademarked by Plaintiffs and presenting them to the public as "Trade for Life" by Velez Capital Management;
4. Temporarily enjoined and will immediately Cease and Desist from hiring Plaintiff's employees in breach of their employment agreements with PCH;
5. Temporarily enjoined and will immediately Cease and Desist from breaching the employment agreements of Defendants Paul Lange, Saul Ortiz-Stevens, and Stephen Cina, which contain restrictive covenants at Paragraphs "3", "4", "5", and "6" forbidding the Defendants from competing with Plaintiff for one year after their employment terminates with PCH; from soliciting Plaintiff's customers or employees for one year after their employment terminates with PCH; and from ever disclosing the Confidential Information of PCH;
- 6.. Temporarily enjoined and will immediately Cease and Desist from presenting to current and future customers "The Pristine Method<sup>®</sup>" and other registered and trademarked materials;
7. To immediately provide an accounting of all revenues of VCM to date, broken down by product category;
8. To immediately disgorge all salaries and profits paid since the inception of VCM, and all defendants to return all PCH materials removed during the period of Defendants' employment,

and to identify and/or erase and return as applicable, all electronic records taken from PCH during the period of Defendants' employment;

9. Temporarily enjoined and will immediately cease and desist from interfering with the business relationship between PCH and Traders Library, and from directing Traders Library not to withhold the publishing and distribute for sale of any PCH materials;

10. That a true copy of the within Order to Show Cause, together with the supporting papers upon which it is made and the Complaint, shall be served via facsimile, overnight mail or hand delivery within 24 business hours, and that said service shall constitute due and proper service under our Court Rules and Statutes;

11. That Defendants shall serve and file responsive papers to the within Order to Show Cause upon Plaintiffs' counsel and each other no later than June , 2007;

12. That Plaintiffs shall serve and file any and all additional documents and certifications in support of the within application no later than \_\_\_\_\_ days before said return date;

13. That Plaintiffs be permitted limited expedited discovery With responses from Defendants to written discovery requests within seven days of receipt thereof;

14. That defendant be ordered to appear for depositions within ten days from the date of service of notices thereof; and

15. That Plaintiff be permitted limited third-party discovery of the common publisher of PCH and VCM publications, "Traders Library".

That Defendants show cause before the Hon. ., United States District Court for the Southern District of New York, 500 Pearl Street, New York, New York on the day of June, 200 at \_\_:00 o'clock in the forenoon or as soon thereafter as counsel may be heard why an order should not be entered:

1. Directing all Defendants not to use materials obtained from PCH, including but not limited to materials taken from "The Pristine Method<sup>®</sup>" manual, and from using the "Trade for Life" manual, including any excerpts or materials therefrom, at the San

Diego Traders Expo during the period June 20, 21, 22, and 23, 2007;

2. Directing all Defendants to immediately Cease and Desist from copying and plagiarizing Plaintiffs' copyrighted and trademarked material, and registered service marks, including but not limited to The Pristine Method®;
3. Directing all Defendants to immediately Cease and Desist from copying and plagiarizing materials copyrighted and trademarked by Plaintiffs and presenting them to the public as "Trade for Life" by Velez Capital Management;
4. Directing all Defendants to immediately Cease and Desist from hiring Plaintiffs' employees in breach of their employment agreements with PCH;
5. Directing all Defendants to immediately Cease and Desist from breaching the employment agreements of Defendants Paul Lange, Saul Ortiz-Stevens, and Stephen Cina, which contain restrictive covenants at Paragraphs "3", "4", "5", and "6" forbidding the Defendants from competing with Plaintiff for one year after their employment terminates with PCH; from soliciting Plaintiff's customers or employees for one year after their employment terminates with PCH; and from ever disclosing the Confidential Information of PCH.
6. Directing all Defendants to immediately Cease and Desist from presenting to current and future customers "The Pristine Method®" and other registered and trademarked materials;
7. Directing Velez and VCM to provide an accounting of all revenues of VCM to date, broken down by product category;
8. Directing Velez and VCM to disgorge all salaries and profits, and all defendants to return all PCH materials removed during the period of Defendants' employment, and to identify and erase and/or return as applicable, all electronic records taken from PCH during the period of Defendants' employment;
9. Directing Velez and VCM to cease and desist from interfering with the business relationship between PCH and Traders Library, and from directing Traders Library not to withhold the publishing and distribution for sale of any PCH materials.

10. That a true copy of the within Order to Show Cause, together with the supporting papers upon which it is made and the Complaint, shall be served via facsimile, overnight mail or hand delivery within 24 business hours, and that said service shall constitute due and proper service under our Court Rules and Statutes.

11. That Defendants shall serve and file responsive papers to the within Order to Show Cause upon Plaintiffs' counsel and each other no later than June , 2007, and

12. That Plaintiffs shall serve and file any and all additional documents and certifications in support of the within application no later than \_\_\_\_\_ days before said return date.

13. That Plaintiffs be permitted limited expedited discovery with responses from Defendants to written discovery requests within seven days of receipt thereof;

14. That defendant be ordered to appear for depositions within ten days from the date of service of notices thereof; and

15. That Plaintiff be permitted limited third-party discovery of the common publisher of PCH and VCM publications, "Traders Library".

**ORDERED**, that plaintiff is guaranteed leave to conduct and serve expedited discovery, including, but not limited, Request for Production of Documents, Interrogatories, and the depositions of Defendants Oliver Velez, Paul Lange, Saul Ortiz-Stevens, and Stephen Cina., prior to the return date of this Order to Show Cause. Any such document request, interrogatories and deposition requests shall be on three (3) days notice; and it is further

**ORDERED**, that plaintiff is granted leave to conduct and serve expedited discovery, including, but not limited to, Request for Production of Documents, Interrogatories, and the depositions of all defendants and employee of VCM prior to the

return date of this Order to Show Cause. Any such document request, interrogatories and deposition requests shall be on three (3) days notice; and it is further

**ORDERED**, that defendants shall serve and file their Answer to the Verified Complaint upon attorneys for plaintiff, Dan A. Druz, 291 E. Main St., Suite 1000, Manasquan, NJ 08736, within twenty (20) days from the date of service of the Verified Complaint and that if defendants shall fail to so file and serve their Answer, judgment by default will be rendered against them for the relief demanded in the Verified Complaint; and it is further

**ORDERED**, that defendants' answering briefs, affidavits and/or certifications in opposition to plaintiff's Order to Show why a preliminary injunction should not issue, shall be served by \_\_\_\_\_ upon plaintiff's counsel, on or before \_\_\_\_\_, 2007; and it is further

**ORDERED**, that plaintiff's reply brief, affidavits and/or certifications, if any, shall be served upon defendants and the Court no later than on \_\_\_\_\_, 2007; and it is further

**ORDERED**, that copies of this Order and Plaintiff's Memorandum of Law in Support of Its Application for Injunctive Relief and for Expedited Discovery shall be served upon defendants by overnight mail.

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U.S.D.J.



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June 19, 2007

VIA FACSIMILE 212 805 6390  
Hon. William H. Pauley III, USDJ  
US Courthouse  
United States District Court for Southern District of New York  
500 Pearl Street  
New York, NY

Re: Pristine Capital Holdings, Inc. v. Velez Capital Management LLC *et al*  
Docket No 07 cv 5720

Dear Hon. Judge Pauley,

In preparation for today's conference at 5 pm, concerning Plaintiff's request for a TRO, we wish to present these brief preliminary points for the court's consideration. At this juncture we are appearing on behalf of only the Defendants Velez Capital Management LLC and Oliver Velez. As best as we are informed, the other 3 individual defendants have not yet been served.

There is no jurisdiction and, therefore, the case in its entirety should be dismissed and attorneys' fees should be awarded.

Paragraph 40 is the only portion of the Complaint that purports to set forth a federal claim, but this paragraph is vague and does not set forth a *prima facie* case of any violation of any federal right.

While Plaintiff seems to allege that it owns the trademark The Pristine Method, it does not anywhere allege that Defendants have used or even intend to use this or any of Plaintiff's other marks. In fact, Exhibit 4 to the Affidavit of Ronald Wagner shows that Defendant is using the mark "Trade for Life™" and the corporate name Velez Capital Management, LLC appears thereon. (In point of fact Defendant has never used the mark The Pristine Method and has no intension to ever do so.)

By statute to make out a claim for trademark infringement the accused defendant must "use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive," 15 USCA 1114(1)(a), but Plaintiff never alleges any "use" by Defendants and in fact its own exhibits show that



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there is no such use! See *Shiraz University School of Medicine Alumni Association USA, Inc. v. Sheik*, 1999 WL 558139, \*4 (S.D.N.Y.)

If this was not enough to throw out the claim, contrary to Plaintiff's counsel Dan Druz' affidavit, the trademark registrations are not owned by Plaintiff. As reflected by the copies provided by Plaintiff's counsel (exhibit 1 to his Affidavit), they are instead owned by Pristine Capital Management, Inc, which is an inactive company (according to the records of the New York State Department of State – Division of Corporations), which is not a party to this action. Moreover, the PTO does not show any assignments of any of the referenced trademarks to Plaintiff or to anyone else. They remain owned by an inactive, defunct company, that is not a party hereto.

Thus, as regards a purported trademark claim, there is an utter failure to even state a claim upon which relief can be granted, since there is not even an allegation of any infringing acts and the Plaintiff does not even own the trademarks!

Plaintiff's intent in Paragraph 40 seems to be for protection of some mostly un-identified materials – it there states "... The resources and methods are all subject to registered service, trademarks and copyrights. VCM and Velez, through repeated reference, and by cloning TPM® for his own use ..."

As best as can be understood, it seems that Plaintiff is alleging "copying" and "infringement" of the The Pristine Method manual and some other un-identified works. Nowhere, however, is there any reference to any certificate of copyright registration. (Moreover, today we electronically searched the records of the US Copyright Office, and there are no listings at all for Pristine Capital.) The law requires, however, as a prerequisite of jurisdiction, that a copyright first be registered before there may be any complaint for copyright infringement. 17 USC 411. *Lapham v. Porach*, 2007 WL 1224924, \*4 (SDNY). Further, this court has recognized that a copyright infringement claim is deficient if the copyright certificate from the Copyright Office is not attached to the Complaint. *Vargas v. Pfizer, Inc.*, 418 F. Supp 2d 369, 373 (S.D.N.Y. 2005)

In addition, the Copyright law preempts any other statute or law with respect to works that could be protected under the Copyright law. 17 USC 301. *Lapham v. Porach*, 2007 WL 1224924, \*13 (SDNY). Common law copyright has not existed for over 30 years. Thus state claims can be preempted if they involve rights similar to those in the Copyright law, like for example the herein causes of action

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for conversion and unfair competition. See *Briarpatch Limited, L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305-6 (2d Cir. 2005). *Integrative Nutrition, Inc. v. Academy Of Healing Nutrition*, 476 F. Supp. 291, 295-6 (S.D.N.Y. 2007)

Accordingly, there are no viable claims for infringement of any name or trademark and likewise no viable claim for copying or infringement of any manuals or printed materials and no claim for copyright infringement. Therefore, there is no claim for trademark or copyright infringement and hence no viable federal claim over which the court has jurisdiction.

The Second through Seventh causes of action are all state claims, but the federal court has no jurisdiction over state claims between residents of the same state unless they are included in an action involving viable federal claims over which the federal court has jurisdiction. *Milano v. The New York City Taxi And Limousine Commission*, 2007 WL 959295, \*2 (S.D.N.Y.). Here there are no extent federal claims, so the "... Second Circuit has observed ... in the usual case in which all federal- law claims are eliminated ... the balance of factors ... point toward declining to exercise jurisdiction over the remaining state-law claims..." *Id.*

Moreover, as regards the individual defendants Paul Lange, Saul Ortiz-Stevens and Stephen Cina no federal claims are asserted and only state claims are asserted, so, as regards them, there does not appear to be any federal jurisdiction what so ever.

Hence, the court likewise has no jurisdiction to hear the state causes of action either.

Since the Plaintiff and its attorney have not properly asserted a viable federal claim over which the court has jurisdiction, have sloppily ignored the facts and their own exhibits and have failed to do even a minimal level of research to determine how to assert a viable claim, and have improperly burdened the court and defendants with an unnecessary and legally insufficient request for a TRO, Plaintiff should be ordered to reimburse Defendants for all of their attorneys fees incurred from June 15, 2007 through today's hearing.

Very truly yours

Bruce E. Lilling

Cc: Plaintiff's counsel Dan R. Druz via facsimile 732 223 1592

Defendants Velez Capital Management LLC and Oliver Velez



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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

2  
3 PRISTINE CAPITAL HOLDINGS,  
3 INC.,

4  
4 Plaintiff,

5  
5 v.

07 CV 5720 (WHP)

6  
6 VELEZ CAPITAL MANAGEMENT, LLC,  
7 et al.,

7  
8 Defendants.

8  
9 -----x

9  
10 June 19, 2007

10 5:30 p.m.

11  
11 Before:

12  
12 HON. WILLIAM H. PAULEY III,

13  
13 District Judge

14  
14 APPEARANCES

15  
15 DAN A. DRUZ  
16 Attorney for Plaintiff

16  
17 LILLING & LILLING PLLC  
18 Attorneys for Defendants  
18 BY: BRUCE E. LILLING

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22  
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1 THE COURT: Good afternoon. Please be seated.  
2 (Case called)

3 THE DEPUTY CLERK: Would counsel for the plaintiff  
4 please state his appearance for the record.

5 MR. DRUZ: Yes. Good evening, your Honor. I'm Dan  
6 Druz. I'm an attorney who is a member of the Bar of this  
7 Court, and my office is located in Manasquan, New Jersey. How  
8 are you, your Honor?

9 THE COURT: Fine. Good afternoon, Mr. Druz.

10 THE DEPUTY CLERK: Counsel for the defendant?

11 MR. LILLING: Yes, your Honor. Bruce Lilling from

12 Lilling & Lilling PLLC, and sitting to my right is Oliver  
13 Velez. He's the principal of the corporate defendant, and he's  
14 also named as an individual defendant. And the other two  
15 people here are law students who are interning at our office  
16 this summer, and they're here to see how the federal court  
17 works. So I hope that that presents no difficulty for you.

18 THE COURT: All right. Good afternoon, Mr. Lilling.  
19 I hope that we can show them that we're functioning on all  
20 cylinders.

21 All right, Mr. Druz, you have an application for a  
22 temporary restraining order. Have all the defendants been  
23 served?

24 MR. DRUZ: Your Honor, the three defendant employees  
25 or employee defendants, as I refer to them in the complaint,  
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1 I'm not certain if proper service has been made. One, there  
2 was an attorney involved for a Florida resident and he's not  
3 indicated to me whether whether or not he would be representing  
4 him in this matter, and I haven't heard from the other two  
5 either. So I can't tell you that they have been, with  
6 certainty.

7 THE COURT: All right. Tell me why it is you believe  
8 you're entitled to emergency relief.

9 MR. DRUZ: Sure. Your Honor, let me cut right to it.  
10 I know you've had a long day. And if you look at exhibit  
11 seven, which was annexed to the declaration of Anthony S.  
12 Nunez, there's three declarations, and I numbered the exhibits  
13 sequentially, even though they're with different declarants.  
14 The one in particular that I'm looking at is a Mr. Nunez's  
15 declaration, and attached to it is an advertisement or  
16 promotional material for a seminar that was held. It was held  
17 a couple weeks ago by Mr. Velez and VCM Capital. And that  
18 promotional material is really the nub of our case, at least  
19 our application for the temporary restraining order, because  
20 it's rife with misinformation that all leads back to Pristine  
21 Capital Holdings, my client. Pristine holds many trademarks,  
22 but most of them are Pristine, Pristine.com, Pristine, the  
23 Pristine Method, there's a whole series of them.

24 THE COURT: Does your client own the mark, The  
25 Pristine Method?

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1 MR. DRUZ: Well, I was surprised -- I saw the  
2 defendant's response at 3:30 today, and I was surprised to see  
3 his challenge. And I checked back with my headquarters. I  
4 wasn't able to get ahold of Pal Goldstein, the Washington firm  
5 that handles the filings, but I was assured that yes, in fact,  
6 Pristine Capital Holdings does own Pristine Capital Management,  
7 which is listed on the particular documents related to the  
8 service marks, and that all of the appropriate notices have  
9 been filed with the trademark office. I can't tell you any  
10 more than that because I couldn't get the attorney from Pal  
11 Goldstein on the phone. I could only tell you what I was told  
12 by my client. But yes, Pristine Capital Holdings -- Pristine  
13 Capital Management was the predecessor firm to Pristine Capital

14 Holdings, and they purchased the records.  
15 (Continued on next page)  
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1 THE COURT: Is there any evidentiary support here in  
2 the papers before me for this chain of corporate ownership?

3 MR. DRUZ: No, your Honor, there is not. There is  
4 not. I was surprised at the challenge. I had -- Mr. Velez is  
5 here today. I don't have them, but Mr. Velez is here today. I  
6 think he would be surprised as well there would be any  
7 challenge to Pristine Capital being the rightful owner of these  
8 service marks.

9 Should I continue?

10 THE COURT: Yes.

11 MR. DRUZ: Okay, thank you. So Pristine is a  
12 registered mark, Pristine, the Pristine Method is a registered  
13 mark and if you look at page 2 of the exhibit, I believe your  
14 law clerk has given to you, it's a two-column page.

15 THE COURT: Which exhibit is it?

16 MR. DRUZ: This is Exhibit 7 annexed to Anthony  
17 Nunez's declaration, Anthony Nunez being executive of the  
18 company. And the first page you see would be -- do you have  
19 this on the first page?

20 THE COURT: I have something that looks like it was  
21 Exhibit 7, but then it was made into an 8, and it's a one-page  
22 e-mail.

23 MR. DRUZ: That is not the exhibit that I'm  
24 referencing. The exhibit I'm referencing is Exhibit 7 attached  
25 to Anthony Nunez's declaration. You're looking at one of the

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1 exhibits attached to my own declaration.

2 THE COURT: All right. I've got the Nunez declaration  
3 in front of me now.

4 MR. DRUZ: Okay, your Honor, thank you. If you turn  
5 to Exhibit 7 --

6 THE COURT: I'm looking at it.

7 MR. DRUZ: So the first page looks like this, Judge,  
8 and then the second page is the page I would like to direct  
9 your attention to.

10 In the right-hand column, this promotional material  
11 talks about Oliver Velez. And if you go down to the third  
12 paragraph, it starts off by saying that Mr. Velez is  
13 internationally known for founding and growing Pristine Capital  
14 Holdings. Pristine is also a registered service mark. You  
15 know, we have a global brand with Pristine Capital Holdings.

16 We don't disagree with Mr. Velez that he's internationally  
17 known, and if you continue in that paragraph, it says that he  
18 grew that company over the last twelve years into the country's  
19 premier educational institution for investors and self-directed  
20 retail traders. Again, we do not disagree with him. We  
21 wholeheartedly agree.

22 But then it starts to veer off a little bit. It says  
23 that as Pristine's chairman, and I don't mean to be repetitive,  
24 but Pristine is a registered service mark, and CEO for twelve  
25 years, he decided to turn his full attention to professional

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1 trading area. Now, Judge, I don't know how much you want me to  
2 go into about the facts about this ancillary securities  
3 industry, but --

4 THE COURT: Now, I'm just waiting to hear the  
5 pertinent facts that you say support an application for  
6 emergency relief.

7 MR. DRUZ: Okay, I'm getting to them, Judge.

8 THE COURT: Okay, well, we've been going at it for ten  
9 minutes. All right? Why don't you jump right to it?

10 MR. DRUZ: All right. Judge --

11 THE COURT: Let me jump right to it.

12 MR. DRUZ: Yes.

13 THE COURT: Isn't it the content that you claim is  
14 purportedly being misappropriated here?

15 MR. DRUZ: Well, that's true, but that's not the  
16 purpose of this application. The purpose of this application  
17 is to show that Pristine, the registered mark, is being used to  
18 confuse the public in order to enable Mr. Velez and VCM --

19 THE COURT: Okay, what other than Mr. Velez saying  
20 that he served as Pristine's chairman, what else is it that you  
21 say constitutes misappropriation of the Pristine mark? Because  
22 I could tell you right now I'm not persuaded by that one.

23 MR. DRUZ: It's the -- within the content of this  
24 promotional material, it refers to Pristine as being an entity  
25 that does things that it does not do. And so the mark --

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1 THE COURT: Wait. You've taken me to the third  
2 paragraph in the second column. You said something like you  
3 agreed with the first two statements in that paragraph, but  
4 then told me it veered off.

5 MR. DRUZ: That's correct.

6 THE COURT: Well --

7 MR. DRUZ: Because the Pristine mark, according to the  
8 registration with the Trademark Office, is only to be used in  
9 certain methods. With seminars, with DVD's that tape those  
10 seminars and with certain other publications and media, and  
11 what's happening here is Mr. Velez is indicating that the  
12 Pristine method, another registered mark of the company, and  
13 Pristine in particular, functions in a different way than what  
14 the mark is going to prove.

15 THE COURT: Isn't he simply saying that he's the  
16 former chief executive of Pristine, and isn't that fair use?

17 MR. DRUZ: Well, your Honor, I guess I disagree with

18 that. Because I don't think it can be fair use --  
19 THE COURT: You don't think he can say -- he was the  
20 former CEO, right?  
21 MR. DRUZ: Agreed.  
22 THE COURT: You don't think he can say that?  
23 MR. DRUZ: I don't think he can say that he trained  
24 60,000 people in what appears --  
25 THE COURT: Where does he say that?  
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1 MR. DRUZ: Says that in the first paragraph. Says in  
2 the first paragraph on the fifth line down.  
3 THE COURT: Right. How is that trademark  
4 infringement?  
5 MR. DRUZ: If you go through and see where he refers  
6 to books that he has written as it relates to those seminars  
7 and you go to those books, they, too, refer to pristine.com and  
8 to the Pristine registered mark, but in fact, the 60,000  
9 traders were not -- the 60,000 persons who were supposedly  
10 educated in those seminars under the Pristine method were not  
11 in fact educated in that manner. The number is incorrect. The  
12 process that was used is incorrect.  
13 THE COURT: How is that trademark infringement, which  
14 is the gravamen of your claim to come into this magnificent  
15 courthouse?  
16 MR. DRUZ: Your Honor, the word "Pristine," the mark  
17 "Pristine" has a certain quality that has become associated  
18 with it over time, and that when a trader in that trading  
19 community sees an adverse promotional material that says  
20 "Pristine" on it, he associates a level of honesty, he  
21 associates a variety of quality factors with it. This  
22 promotional material is completely inaccurate as to those  
23 qualities.  
24 THE COURT: Just explain to me how the defendants are  
25 using the same or similar mark to Pristine other than through  
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1 their fair use references that Velez, the defendant, was the  
2 former CEO of Pristine.  
3 MR. DRUZ: Admittedly, I can't get past your -- I'm  
4 not going to call it a ruling, but your assumption that it's  
5 fair use.  
6 THE COURT: It's not a ruling. I'm asking about the  
7 law. You're here alleging trademark infringement. Where is  
8 it?  
9 MR. DRUZ: And I'm saying that every reference to  
10 Pristine that's made in here is an inaccurate one, and thereby  
11 diminishes the value of that mark.  
12 THE COURT: Where on this page does Velez use the term  
13 "the Pristine Method"?  
14 MR. DRUZ: He doesn't. He uses just the registered  
15 mark Pristine.  
16 THE COURT: Where does he use the registered mark  
17 Pristine?  
18 MR. DRUZ: He does not put the registered mark next to  
19 it, but he uses the word "Pristine" at the third paragraph and



20 again --

21 THE COURT: Line 2?

22 MR. DRUZ: Yes, Pristine Capital Holdings.

23 THE COURT: He says that he's the former CEO of  
24 Pristine Capital Holdings. You think that that's trademark  
25 infringement?

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1 MR. DRUZ: And there's another place, Judge.

2 THE COURT: You think that's trademark infringement?

3 MR. DRUZ: Where he refers to Pristine and he  
4 associates all of these, I'm going to call them negative  
5 services and negative -- negative for us in terms of the manner  
6 in which he's conducting his business, yes.

7 THE COURT: How is it negative? He's saying that he  
8 founded and grew Pristine Capital into one of the company's  
9 premier educational institutions. How is that negative?  
10 Assuming that it's not fair use, which is an assumption that I  
11 think you can't make.

12 MR. DRUZ: It's negative in the totality of the  
13 content of this promotional material, because it misstates what  
14 it is that the Pristine -- what it is that Pristine does, it  
15 misstates those things that are associated with that mark.

16 THE COURT: I thought the thrust of your complaint in  
17 this case was that Mr. Velez took the Pristine method, slapped  
18 a new name on it, called Trade for Life, and went out and is  
19 marketing and selling Trade for Life.

20 MR. DRUZ: Yes, that would go to some of the other  
21 claims, your Honor. I hadn't asserted that as part of this  
22 particular application.

23 THE COURT: Okay. So let me just see if I have this.  
24 The only basis for you to be here in federal court is if you  
25 have a federal trademark claim, right?

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1 MR. DRUZ: Yes.

2 THE COURT: All right. Is there anything else to  
3 support your federal trademark claim, other than the reference  
4 to Pristine Capital Holdings in the third paragraph of Exhibit  
5 7 and the statement that after serving as Pristine's chairman  
6 and CEO for twelve years, Mr. Velez decided to turn his full  
7 attention to the professional trading arena?

8 MR. DRUZ: Yes, Judge. The references to the  
9 seminars, which could only have occurred at Pristine, because  
10 Mr. Velez went from Pristine to VCM with no break and no other  
11 employer, are inaccurate. And so they're violative of,  
12 (a)(1)(a) and (b). Section 1125(a)(1), subparagraphs (a) and  
13 (b).

14 THE COURT: Forgive me if I'm not getting it,  
15 Mr. Druz, but in your memorandum of law at page 5, you say of  
16 Mr. Velez, quote, "He's likely seeing the same teacher,  
17 teaching the same program, using the same manual, only with a  
18 different cover!" Close quote. That's the customer confusion  
19 that you describe in your memorandum of law, isn't it?

20 MR. DRUZ: Yes, I did pick out that point, yes, sir.

21 THE COURT: How is that trademark infringement?



22 MR. DRUZ: Well, I would not rely so much on that as I  
23 would on the attachment to the declaration, and where  
24 there's --

25 THE COURT: We're back to Exhibit 7?  
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1 MR. DRUZ: Yes, sir. Where there's comments like,  
2 "They proved how potent they are by providing a big score,  
3 high-octane trading style," that "this method, microtrading has  
4 the potential to serve as a solution to many of the world's  
5 social ills."

6 The whole tenor of this is now associated with the  
7 trademark Pristine, and it's a piece that's beyond puffery, so  
8 now people will associate this piece of advertising, the  
9 promotional piece, this highly deceptive one, with Pristine.  
10 Mr. Velez in this advertising material relies on his background  
11 with Pristine, and so there's a connection that's to be made  
12 between Velez Capital Management and Pristine that should not  
13 be made, but if you read through the totality of this  
14 promotional piece which attributes, has these wild claims with  
15 it, that is not a good thing for maintaining the strength of  
16 our mark.

17 It's associating our mark unwillingly with a --

18 THE COURT: If Mr. Velez taught 60,000 people around  
19 the world how to day trade or whatever it is, why shouldn't he  
20 be able to say that?

21 MR. DRUZ: He should be able to say it, but he  
22 shouldn't infer that it was not with Pristine or that it was  
23 somehow with this competitive firm. He shouldn't pump up that  
24 product at the expense of Pristine. He's only been at --

25 THE COURT: How is that trademark infringement?  
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1 MR. DRUZ: Because my understanding of the statute,  
2 with particularly the section 1125(a)(1)(a) and (b), in  
3 commercial advertising and promotion misrepresenting the  
4 nature, characteristics, qualities or geographic origin of his  
5 or her or another person's goods, services or commercial  
6 activities, in this case the services, various names for which  
7 we've obtained service marks for.

8 THE COURT: Anything else?

9 MR. DRUZ: No, sir. Thank you.

10 THE COURT: Mr. Lilling, do you want to be heard?

11 MR. LILLING: Yes, just briefly, your Honor. I must  
12 tell you I read this complaint several times and I don't have a  
13 clue what his complaint is. This is the first time now I'm  
14 starting to get an inkling that he's not talking about  
15 trademark infringement or copyright infringement, but he's  
16 talking about false advertising.

17 Be that as it may, let me go through a couple of quick  
18 points. On this Exhibit 7, if you look at the first page,  
19 which he glossed over quickly --

20 THE COURT: Hold on.

21 MR. LILLING: You'll see that he has his new company  
22 name there pretty prominently, his personal name and his  
23 trademark Trade for Life. Now, I'll concede that if he had put

24 Pristine there, that would be a classic case of trademark  
25 infringement.

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1 Now, as we get into the text, there are two versions  
2 of this document. This is the one that was circulated without  
3 Mr. Velez' consent and has a minor error in it, and it's  
4 different from the one that appears on his website. In  
5 particular, it's in the second column in the first paragraph,  
6 where it refers to the 60,000 traders, and it says, "His Trade  
7 for Life seminars and five-day" --

8 THE COURT: I see it.

9 MR. LILLING: That's the error, because it was not  
10 supposed to say his Trade for Life seminars, because under that  
11 name he didn't train 60,000 people. This was put out by  
12 somebody who put it out too quickly without him checking it.  
13 If you look at the same version on his website, you'll see that  
14 that language has been massaged so it doesn't refer to Trade  
15 for Life, but merely refers to the fact that Mr. Velez himself  
16 taught 60,000 people, which, as you had suggested, there's  
17 nothing wrong with that if in fact he did, and in point of  
18 fact, Mr. Velez taught approximately 60,000 people, whereas  
19 Pristine taught approximately 88,000. Though, of course, there  
20 is some overlap there.

21 I don't really have much more to say on the trademark  
22 infringement issue, because you said it better than me, that  
23 it's fair use. But I would like to mention on the ownership  
24 issue, I have here a copy of a printout from the New York State  
25 Department of State from yesterday which says that Pristine

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1 Capital Management is an inactive company --

2 THE COURT: You don't have anything more recent than  
3 yesterday?

4 MR. LILLING: Sorry. I didn't find out about the case  
5 until yesterday morning. Mr. Velez thinks it went inactive in  
6 the year 2000, but -- oh, we do have something from today, your  
7 Honor. We went on the Patent Office website and for every  
8 single one of the registrations he cites, we have a printout  
9 from the Patent Office saying no assignment has been recorded.  
10 This has today's date on it, with a heading for the U.S. Patent  
11 Office. So I don't understand the comment that they're in the  
12 process of doing the paperwork, but I don't know that it really  
13 makes any difference, because there can't be trademark  
14 infringement unless the accused is using the alleged trademark  
15 in some way, shape or form, which we're not doing.

16 So, in fact, we don't even have an objection to an  
17 injunction on using the Pristine method because we don't use  
18 it. We never use it and we have no intention of using it.  
19 However, we do think we should be entitled to the fair use of  
20 saying that Mr. Velez previously worked at Pristine Capital  
21 Holdings, but that's not trademark use and there's no case that  
22 has ever held that as trademark use.

23 We also have the issue that if we read the first  
24 paragraph of his requested TRO, he's clearly asking for relief  
25 under the copyright law, because he's asking that materials not

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1 be distributed, and you'll notice how they only give you the  
2 first page of the two PowerPoint presentations. One of the  
3 reasons they did that is because they didn't want you to look  
4 at both of them, because if you took both of them and looked at  
5 them side by side, you'll find out that there's no  
6 similarities. But even still, your Honor, they don't have a  
7 copyright certificate, so we don't even get in the door on  
8 copyright.

9 THE COURT: They don't have a copyright claim in the  
10 complaint.

11 MR. LILLING: Well, they talk about taking the  
12 manuals. I mean, they don't refer to the copyright law, but if  
13 you look at paragraph 40, which is inartfully drafted, even  
14 though he's referring to a trademark statute, when I read that,  
15 it sounded to me more that he was complaining about our taking  
16 manuals and materials as opposed to improperly using the  
17 trademark. That's why I say I don't know if they're talking  
18 trademarks or copyrights.

19 THE COURT: All right.

20 MR. LILLING: And as far as the state causes of  
21 action, I don't think there's jurisdiction, because I don't  
22 think he has made out a prima facie case of any federal claim,  
23 so then there's no reason for the Court to be looking at the  
24 state causes of action.

25 THE COURT: All right.

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1 MR. LILLING: And that's really all we need.

2 THE COURT: Is there anything further, Mr. Druz?

3 MR. DRUZ: Yes, Judge, very briefly. I just don't  
4 believe it would be fair to consider the ownership issue.  
5 Mr. Lilling had discovered it and had the opportunity to make  
6 me aware of it, I only found out about it 3:30 today, which  
7 handcuffed me in terms of being able to show the ownership of  
8 the trademark and service mark. That's all.

9 THE COURT: Okay. But you filed this action. One  
10 would think that as a matter of due diligence you would check  
11 to make sure that your client actually owns the trademark  
12 before you sue on it.

13 MR. DRUZ: Judge, in my own defense, the letters which  
14 were written to Pristine Capital Holdings that cover the  
15 documents from the Patent and Trademark Office are all  
16 addressed to Pristine Capital Holdings saying we have done what  
17 you asked us to do, so I don't think I made a terrible  
18 assumption. Harold Goldstein, the premier patent and trademark  
19 attorneys in Washington, would have made that mistake, but I  
20 have spoken to Pristine and they told me, and I have asked them  
21 before, that they do own these registered marks.

22 THE COURT: All right. There are a lot of issues  
23 here. Because there are a lot of issues here, it's clear to me  
24 that emergency relief is not warranted. Let's fix a schedule  
25 for briefing on this motion for preliminary injunction.

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1 First of all, do you want to amend your complaint?  
2 MR. DRUZ: I will want to, yes.  
3 THE COURT: And try to clean it up?  
4 MR. DRUZ: Yes, absolutely.  
5 THE COURT: Because it's a train wreck.  
6 MR. DRUZ: Okay.  
7 THE COURT: When are you going to file an amended  
8 complaint?  
9 MR. DRUZ: Can I just check one second, please? Two  
10 weeks?  
11 THE COURT: Whatever time you want.  
12 MR. DRUZ: I'd like 30 days.  
13 THE COURT: Take 30 days.  
14 MR. DRUZ: I'll take 30 days.  
15 THE COURT: You'll file an amended complaint. Since  
16 you're going to file an amended complaint, do you want to  
17 withdraw this motion and file a motion when you file your  
18 amended complaint?  
19 MR. DRUZ: Yes.  
20 THE COURT: All right. This motion for preliminary  
21 injunction is withdrawn. File an amended complaint and a  
22 motion for a preliminary injunction if you decide that's what  
23 you want to do 30 days from today. That is by July 19. How  
24 much time do you want to respond to the motion?  
25 MR. LILLING: Your Honor, I'm scheduled for an  
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1 out-of-the-country business trip starting on the 26th, so I'm  
2 going to ask for a month from the 19th, otherwise, because I'll  
3 be gone for ten days.  
4 THE COURT: August 17.  
5 MR. LILLING: Okay, August 17.  
6 THE COURT: Any reply by August 27. And I'll hear  
7 oral argument on August 31 at 10:30. I'll enter a scheduling  
8 order to that effect. Is there anything further?  
9 MR. LILLING: Your Honor, in the concluding portion of  
10 my letter today, I asked the question of whether we might be  
11 entitled to attorneys fees before being required to work on an  
12 expedited basis for answering what's clearly a frivolous and  
13 unjustified request for a TRO. So I just leave that within the  
14 Court's discretion.  
15 THE COURT: Well, you're about 4500 miles too far west  
16 for that request.  
17 MR. LILLING: Okay. Thank you, your Honor.  
18 THE COURT: In Great Britain, they do it, but not  
19 here.  
20 Mr. Druz, I think you better think through this case.  
21 I will tell you viscerally, I'm not seeing any trademark  
22 infringement here. I see only fair use and at the end of the  
23 day, if there's no statutory basis to be here under the  
24 trademark laws or some other federal statute, then you should  
25 be pursuing your contract claims in the palace of justice  
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1 across the street, because otherwise you're just going to go  
2 through a lot more motion practice here, and if you decide to  
3 simply withdraw this case here and proceed across the street on  
4 a contract claim, just file a Rule 41 notice of dismissal. You  
5 might be saving a lot of effort on everybody's part. All  
6 right?

7 MR. DRUZ: Okay, Judge. I hear you loud and clear.

8 THE COURT: All right.

9 MR. DRUZ: Judge, I didn't want to be discourteous.

10 Thank you for your courtesy yesterday in permitting me to go to  
11 my son's graduation instead of coming in here.

12 THE COURT: Of course. All right, counsel, thank you  
13 very much.

14 MR. LILLING: Thank you, your Honor.

15 THE COURT: I hope your interns think we're operating  
16 on all cylinders, Mr. Lilling. Have a good evening.

17 MR. LILLING: Thank you.

18 (Adjourned)  
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